offences charged against him in an indictment or charge and another accused person has pleaded 'not guilty' to the offence or offences charged against him in another separate and independent indictment or charge it is elementary criminal law that the issues raised by these two pleas cannot be tried together. See *per* Lord Atkinson in *Crane's* case.

It was conceded as I understood it by the Deputy Public Prosecutor that the trial was bad but it was argued that it was but a mere irregularity which could be cured by the application of the provisions of section 440 of the Criminal Procedure Code.

It was not disputed that the procedure adopted here did not result in any miscarriage of justice but in the view I take it struck at the root of the jurisdiction of the court to try the appellants.

The district court in the circumstances had no jurisdiction to try the appellants jointly on these two charges or indictments and the trial was a nullity *ab initio*. It only remains for me to say how much I regret coming to this decision as the point is a pure technicality and as I have said there is no merit in this appeal on the facts.

In arriving at this conclusion I am aware that I have the misfortune to find myself in disagreement with the decision of Raja Azlan Shah J. in *Syed Ismail* v. *Public Prosecutor* [4] to which my attention was drawn.

The appeal must accordingly be allowed and the convictions and sentences quashed and I direct that there shall be a new trial.

Appeal allowed.

New trial ordered.

Solicitors: *Yin Ee Kheng; David Marshall.*

YEO GOON NYOH & ANOR. v. OCEAN STEAMSHIP CO. LTD.

[O.C.J. (Buttrose J.) October 13, 1967]

[Singapore — Suit No. 764 of 1966]

Shipping — Bill of Lading — Carriage of Goods — Goods damaged by sea water — Claim for damages — Proof — Liability — Carriage of Goods by Sea Act, 1924, Schedule, art. III r. 2.

Under a bill of lading dated August 18, 1965 three cases of pistons belonging to the plaintiffs were shipped at Liverpool in apparent good order and condition on board the defendant's vessel "Clytoneus" for carriage to and delivery at Singapore. The vessel arrived in Singapore on September 12, 1965 and the three cases of pistons were discharged into godowns on September 13 and 14, 1965. The plaintiffs took delivery of the cases on September 17, 1965 and it was found that the contents of one of the cases was wet and the pistons were rusted. The contents of the remaining two cases were not damaged in any way. The plaintiffs sued the defendant claiming damages for breach of contract or duty and/or for negligence in and about the carriage of the plaintiffs goods on the defendant's vessel. The defendant denied any breach of duty or reasonable care on their part in the loading or carriage of the plaintiffs' goods by allowing the goods to come in contact with sea water. The defendant maintained that the plaintiffs must prove not only damage to the goods but that the damage was caused by sea water as specifically pleaded in the statement of claim. It was not in dispute that the goods were damaged. It was also not in dispute that they were shipped in apparent good order and condition.

Held: (1) the only reasonable inference to be drawn from the evidence in this case was that the goods were damaged after shipment and before discharge. Further on the probabilities of the matter the goods were damaged by sea water as alleged;

(2) all the plaintiffs need prove was damage and it was not fatal to their case if the damage was caused other than by sea water;

(3) as the plaintiffs had shown that the goods were shipped in good order and condition and were found on discharge to be damaged the burden of proof thus shifted to the defendant to show that it was not responsible for the damage and this it had failed to do. There should therefore be judgment for the plaintiffs with costs.

Cases referred to:—

(1) *Gosse Millard* v. *Canadian Government Merchant Marine Ltd.* [1927] 2 K.K. 432.

(2) *Albacora S.R.L.* v. *Westcott & Laurence Line, Ltd.* [1965] 2 Ll. L.R. 37.

CIVIL SUIT.

Lee Boon Siong for the plaintiffs.

M. Karthigesu for the defendant.

Cur. Adv. Vult.

Buttrose J.: The plaintiffs in this action claimed from the defendant damages for breach of contract or duty and/or for negligence in and about the carriage of three cases of pistons on board the defendant company's vessel *'Clytoneus'*.

Under a bill of lading dated the 18th August, 1965, there were shipped at Liverpool in apparent good order and condition on board the *'Clytoneus'* three cases of pistons for carriage to and delivery at Singapore.

The plaintiffs were at all material times the owners of the goods comprised in the three cases or the indorsees of the bill of lading to whom the property in the goods passed upon or by reason of the indorsement, alternatively, the plaintiffs presented the bill of lading at Singapore and took delivery thereunder.

On the 12th September, 1965, the vessel arrived at Singapore and the three cases of pistons were discharged into godowns 1 and 2 on the 13th and 14th September, 1965. The plaintiffs took delivery of the goods on the 17th September, 1965. On the morning of the 18th September, 1965 one of the cases was opened and it was found that the contents were wet and the pistons

were rusted and pitted by, so it was alleged, coming into contact with salt water. The contents of the remaining two cases were not damaged in any way.

The plaintiffs alleged that it was the duty of the defendant or that the defendant by the bill of lading expressly or impliedly contracted to deliver the goods in the same good order and condition in which they were shipped. Further or alternatively it was the duty of the defendant or the defendant impliedly contracted to exercise reasonable care of the goods during the loading, carriage and discharge thereof. In breach of the said duty or contract the defendant, its servants or agents, failed to take reasonable care of the goods during the loading or carriage thereof by allowing the goods to come into contact with sea water.

The defendant denied that in breach of its duty or contract it delivered the goods damaged by sea water or that it was its duty or that it impliedly contracted to exercise reasonable care of the goods during the loading, carriage and discharge thereof. The defendant further denied that in breach of its duty or contract the defendant, its servants or agents, failed to take reasonable care of the goods during the loading or carriage thereof by allowing the goods to come into contact with sea water.

That there was damage to the goods was not in dispute. It was also not in dispute that they were shipped in apparent good order and condition. Not only does the bill of lading say so but Mr. Matthews on behalf of the defendant company admitted it. Furthermore Mr. Keenan a master mariner and surveyor stated that the case containing the pistons was generally dry stained externally and had been in contact with water. When he examined the case some 7 or 8 days after its discharge from the ship at Singapore he found the interal condition of the case very wet to touch — this condition he said certainly was not recent and that it was possible it could have been present for some three weeks prior to his examination when it would have been very much wetter then than when he carried out his inspection.

Mr. Matthews said that if this case had shown any signs of staining prior to shipment the stevedores at Birkenhead would have noticed it as to his personal knowledge they were experienced men.

It seems to me that the only reasonable inference to be drawn from this evidence is that the goods were damaged after shipment and before discharge.

The plaintiffs' case on these facts was that all they had to prove was that the goods were shipped in good order and condition and on discharge were found to be damaged and the burden of proof then shifted to the defendant to show that it was not responsible.

I consider that to be a correct statement of the law as it stands at present. See *Gosse Millard* v. *Canadian Government Merchant Ltd.*[1] and *Albacora S.R.L.* v. *Westcott & Laurence Line, Ltd.*[2]

The defendant's case on the other hand was that the plaintiffs must prove not only damage to the goods but that the damage was caused by sea water as specifically pleaded and that unless it can do so its claim fails.

The analytical chemist called by the plaintiffs gave evidence to the effect that a sample of the goods taken from the case was examined and tested by him and that its condition was consistent with having come into contact with sea water. There was evidence that on taking one of the cartons out of the case it smelt of salt water and there was the fact that the goods, as I have found as a fact, were damaged while on board the ship.

Dr. Rintoul an analytical chemist called by the defendant gave us his version of how to test for the presence of sea water and stated that in his opinion the evidence of the plaintiffs' expert Mr. Subramanian was inconclusive. Dr. Rintoul never examined or tested any of the goods and his evidence merely amounted to a short lecture on the best method of testing for sea water contact and he admitted that he was not aware how Mr. Subramanian carried out his experiments.

On this issue therefore on the probabilities of the matter I find as a fact that the goods were damaged by sea water as alleged.

If, however, I am wrong in this I am, nevertheless, of the opinion that all the plaintiffs need prove is damage and it is not fatal to their case if the damage was caused other than by sea water. To hold otherwise so it seems to me would be to flout the application of the provisions of the Carriage of Goods by Sea Act 1924 and the rules comprised in the schedule thereto to which of course the bill of lading was subject. Under Article III rule 2 it is enough if the owner of the goods proves either that the goods have not been delivered or have been delivered damaged.

The plaintiffs however having established, in my judgment, that the goods were damaged by sea water while on board the ship the onus shifts to the defendant to show how the damage occurred and that it occurred without negligence on its part. This, in my view, it has failed to do.

For some reason best known to the defendant company no attempt was made to call any officer or member of the crew of the *'Clytoneus'*

and the only evidence as to the loading, handling, stowage and carriage of the goods was supplied by Mr. Matthews an employee of Mansfield & Co. Ltd. the Singapore agents of the defendant and a tally clerk who operated on the wharf checking the Singapore cargo as it was discharged.

Mr. Matthews was not present either at the loading or the discharging of the goods and the defendant had to rely on a stowage plan and the tally clerk's records to show how the case containing the goods in question was stowed, carried and discharged from which I was asked to infer that the goods could not have been damaged during the voyage by sea water or any other cause.

The goods were damaged and the defendant does not discharge the onus of proof which lies upon him simply by saying that it would not have occurred by reference to a stowage plan and tally sheets. It was urged upon me that although over 2,000 tons of cargo was shipped on the *'Clytoneus'* yet only the contents of one little case got wet. The defendant is unable to give any explanation as to how the damage occurred nor does it claim that the damage falls within one of the immunities specified in Article IV rule 2.

For these reasons, in my view, the defendant has failed to discharge the onus or burden of proof which lies upon it of showing that it was not negligent and in the result there will be judgment for the plaintiffs with costs.

Judgment for the plaintiff.

Solicitors: *Drew & Napier; Allen & Gledhill.*